

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	CC Docket No. 99-68
Inter-Carrier Compensation for ISP-Bound Traffic	)	

**COMMENTS OF CABLEVISION LIGHTPATH, INC.**

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April 12, 1999

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In the Matter of )  
 ) CC Docket No. 99-68  
Inter-Carrier Compensation for ISP-Bound Traffic )

## COMMENTS OF CABLEVISION LIGHTPATH, INC.

Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC's") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding. Lightpath is a full service, facilities-based competitive local exchange carrier ("CLEC") and is committed to offering low-priced, high-quality telecommunications services to a wide variety of business and residential customers, including Internet service providers ("ISPs"). As the FCC has recognized, Lightpath and other local exchange carriers ("LECs") incur significant costs when delivering traffic to their ISP customers, just as they incur costs when delivering traffic to traditional local service customers.<sup>1/</sup> Accordingly, Lightpath has a vested interest in the outcome of this proceeding and in ensuring that it continues to be fully compensated for its costs when terminating traffic which originates on another carrier's network.

<sup>1/</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, FCC 99-38 at 19, ¶ 29 (rel. Feb. 26, 1999) (“Declaratory Ruling” and “NPRM”).

CLECs such as Lightpath have developed business plans and made substantial investments in infrastructure and residential telephony services based on the carefully crafted reciprocal compensation scheme that exists today. As Lightpath recently explained in a proceeding before the New York Public Service Commission (“NYPSC”) on related issues,<sup>2/</sup> the current scheme is the product of lengthy federal and state proceedings during which regulators thoroughly investigated the underlying economic and policy issues. The existing reciprocal compensation framework was devised with the input of numerous parties and remains as sound today as it was when it was first implemented.

The FCC should not pull the rug out from new entrants by removing ISP-bound traffic from this well-considered scheme just as competition is taking hold in the local market. Removing ISP-bound calls would not only undermine CLEC expectations and threaten investment, but would lead to the piecemeal dismantling of the comprehensive reciprocal compensation framework currently in place. Separating out ISP-bound calls for disparate treatment would also burden state commissions by requiring them to re-institute proceedings and derive new reciprocal compensation rates based on the costs and characteristics of the remaining traffic. Finally, creating a separate inter-carrier compensation regime for ISP-bound traffic would be inconsistent with existing FCC precedents treating this traffic as local, would encourage incumbent local exchange carriers (“ILECs”) to “game” the regulatory system, and would unfairly rob CLECs of hard-fought gains they have won in the marketplace.

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<sup>2/</sup> New York Public Service Commission Cases 98-C-1273, 98-C-1479 ACC National Telecom Corp. Blocking Obligations for Chatline Services and Complaint of Origin Communications, Inc. Against Frontier Telephone of Rochester, Inc. Concerning Alleged Blocking of Free Chatlines, Comments of Cablevision Lightpath, Inc. at 4-5 (Mar. 22, 1999) and Reply Comments of Cablevision Lightpath, Inc. at 3 (Mar. 29, 1999), attached hereto as Attachments A and B, respectively (“Lightpath’s Chatline Comments” and “Lightpath’s Chatline Reply Comments”).

At bottom, this proceeding represents nothing more than an attempt by the ILECs to seek regulatory relief in the face of competition. Competitive carriers have succeeded in identifying and capturing a segment of the market that the ILECs originally believed they could win for themselves. Rather than compete for these customers in the marketplace, the ILECs have chosen to seek regulatory relief from the FCC and various state commissions. These attempts should not be rewarded – the ILECs should not be allowed to win in the regulatory forum what they could not win in the marketplace. This is especially true given that the ILECs continue to favor applying reciprocal compensation to CMRS<sup>3/</sup> calls, where the traffic and payment imbalance weighs strongly in their favor.

Lightpath respectfully requests the FCC to keep the current comprehensive reciprocal compensation framework in place and to ensure that any adjustments that are justified:

- apply to all traffic that is not subject to access charges; and
- will not disrupt existing interconnection agreements.

**I. CARRIERS MUST CONTINUE TO HONOR THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING INTERCONNECTION AGREEMENTS**

Carriers must continue to honor their contractual reciprocal compensation obligations. CLECs have entered into interconnection agreements with ILECs, and the terms of those agreements have significantly informed the business strategies of CLECs, including their infrastructure investment plans. Carriers prioritize the issues being negotiated, and make

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<sup>3/</sup> Commercial Mobile Radio Service (“CMRS”) includes most traditional wireless traffic, including personal communications services (“PCS”), cellular and satellite telephone service, among others. See Interconnection Between Local Exchange and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5022 (rel. January 11, 1996) (“CMRS NPRM”).

concessions and demands based on a cost-benefit analysis. Given the volatility involved in entering a new market, CLECs such as Lightpath put a high priority on obtaining the certainty associated with a contractual agreement setting out the terms and conditions of interconnection. A key aspect of such interconnection agreements is negotiating a reciprocal compensation rate that ensures that each carrier is compensated for the costs it incurs in terminating calls, including calls terminated to ISP customers. These contractual arrangements between carriers must remain in effect until the expiration of such agreements. Otherwise, the FCC risks destabilizing CLEC business plans.

Radical changes to the terms of existing agreements would seriously jeopardize CLECs' ability to make the infrastructure investments necessary to roll out competitive services on a broad scale. This is especially true of CLECs such as Lightpath that are poised to expand their roll out of facilities-based residential telephony. The FCC has already clearly indicated its intention that interconnection agreements not be disrupted by its Declaratory Ruling. However, a strong confirmation of this intention is necessary given the recent actions of some ILECs.<sup>4/</sup> The FCC

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<sup>4/</sup> The FCC's Declaratory Ruling has led ILECs such as Bell Atlantic to file a series of petitions in several states seeking to change existing reciprocal compensation arrangements, and trying to shirk their obligations under existing agreements. In New York, for example, Bell Atlantic filed a petition asking the NYPSC to overturn its existing ISP Order, New York Public Service Commission Case 97-C-1275, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding (Mar. 19, 1998) ("New York ISP Order"), and allow Bell Atlantic to cease making reciprocal compensation payments to CLECs for ISP-bound calls. New York Public Service Commission Case 97-C-1275, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Petition of Bell Atlantic - New York to Re-Open Case 97-C-1275 (Mar. 2, 1999) ("BA-NY's ISP Petition"). Bell Atlantic even asked the NYPSC to allow it to immediately escrow its reciprocal compensation payments pending the NYPSC's ruling on Bell Atlantic's petition. Id. Bell Atlantic's petition is clearly inconsistent with the FCC's intent and would leave CLECs without any compensation for the legitimate network costs they incur in terminating calls to their ISP customers.

should make clear that any rule it adopts pursuant to this NPRM also will not disrupt existing agreements.

## **II. A SOUND INTER-CARRIER COMPENSATION SCHEME MUST APPLY TO ALL TRAFFIC WITH LOCAL CHARACTERISTICS THAT IS NOT SUBJECT TO ACCESS CHARGES**

The FCC's conclusion that ISP-bound traffic is interstate in nature does not require the Commission to exclude such traffic from reciprocal compensation arrangements. As the FCC itself has recognized, ISP traffic has the same characteristics as jurisdictionally local traffic. Given the similarities between ISP-bound traffic and other local traffic, network economics and regulatory policy demand that it be treated as part of the same generally applicable reciprocal compensation framework that governs jurisdictionally local traffic. This framework is as sound today as it was when the incumbent LECs first advocated for it, and when the FCC and many states adopted it.<sup>5/</sup> Thus, any adjustments to inter-carrier compensation must be justified under the existing framework, through a comprehensive review, and must apply to all traffic.<sup>6/</sup> Singling out ISP-bound traffic for disparate treatment would be unjustified and would open the door to

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<sup>5/</sup> See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16022-16023 (1996) ("Local Competition Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (9<sup>th</sup> Cir. 1997) (CompTel), aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) (Iowa Utils. Bd.), aff'd in part and vacated in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); further recon. pending.

<sup>6/</sup> Lightpath's concerns focus on the substantive issue of ensuring that symmetrical cost-based inter-carrier compensation continues to apply uniformly to all traffic that is not subject to access charges. Lightpath takes no position on the procedural aspect of how these substantive decisions should be implemented. The FCC could maintain the status quo, leaving it to the states to decide issues of reciprocal compensation, subject only to the requirement that the states treat ISP-bound traffic the same as jurisdictionally local traffic for reciprocal compensation purposes, or it could work jointly with the states to devise a new overall compensation scheme.

endless regulatory gaming. Moreover, a precedent already exists for treating jurisdictionally interstate calls as local for reciprocal compensation purposes – the FCC has allowed CMRS traffic to be subject to reciprocal compensation despite the fact that such traffic is subject to federal, rather than state jurisdiction.

**A. ISP-bound Calls Have the Same Characteristics as Traditionally Local Calls and Should Be Treated the Same for Purposes of Inter-carrier Compensation**

In the same Declaratory Ruling<sup>7/</sup> in which the Commission concluded that ISP calls are jurisdictionally interstate, the FCC also recognized its “long-standing policy of treating this traffic as local,” reiterating the many ways ISPs and ISP traffic are treated as local for other, closely related regulatory purposes.<sup>8/</sup> ISPs and calls to ISPs have all the salient characteristics of local users and local calls: 1) they use local telephone numbers; 2) they are not subject to access charges; 3) they are billed at local rates; and 4) they are treated as local for ARMIS and separations purposes.<sup>9/</sup> In addition, ISPs are allowed to purchase their links to the public switched telephone network through *intrastate* business tariffs, they pay local business rates and interstate subscriber line charges for their switched access connections to LEC central offices and they pay the special access surcharge when purchasing special access lines under the same

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<sup>7/</sup> Declaratory Ruling at ¶ 1.

<sup>8/</sup> Id. at ¶ 24.

<sup>9/</sup> Declaratory Ruling at ¶ 4; Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988) (“ESP Exemption Order”) (stating that ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices); Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd 3983, 3987-3988 (1989).

conditions as those applicable to end users.<sup>10/</sup> An ISP also receives service like any local end-user “typically purchas[ing] [local] business lines from a LEC, for which it pays a flat monthly fee.”<sup>11/</sup> By allowing ISPs to purchase service in the same manner as other local customers, the FCC has consistently “discharged its interstate regulatory obligations by treating ISP-bound traffic *as though it were local*.”<sup>12/</sup>

Similarly, state commissions have also recognized the local characteristics of ISP-bound traffic. For example, the NYPSC has found that “a call to an ISP is no different from a call to any other large volume customer, such as a local bank or a radio call-in program.”<sup>13/</sup> All of these calls “are billed at local rates and are treated as local calls for ARMIS Reporting and Separations.”<sup>14/</sup> In addition, the NYPSC found that calls to ISPs are no more costly than other local calls.<sup>15/</sup> Thus, both the FCC and state commissions have concluded that ISP-bound traffic should properly be treated as local for regulatory purposes and the policies underlying these decisions continue to hold true, regardless of how the traffic is designated for jurisdictional purposes. The existing, generally applicable reciprocal compensation scheme should therefore continue to apply to ISP-

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<sup>10/</sup> Declaratory Ruling at ¶ 5.

<sup>11/</sup> Id. at ¶ 4.

<sup>12/</sup> Id. at ¶ 5 (emphasis added).

<sup>13/</sup> New York ISP Order at 3 (concluding that calls to ISPs should not be treated any differently from local calls placed to other end-users). See also, id. at 6 (stating that “there is nothing unique about internet traffic...that would warrant a different compensation structure for this type of call”).

<sup>14/</sup> New York ISP Order at 3; accord Declaratory Ruling at ¶ 5 (discussing the many ways that the Commission treats ISP-bound traffic as though it were local).

<sup>15/</sup> New York ISP Order at 5.

bound calls. Indeed, any other treatment might give rise to a legal claim that the agency is acting inconsistently and therefore contrary to norms of reasoned decision-making.

The notion that all traffic with local characteristics should be treated as part of the same comprehensive scheme is also embedded in the TELRIC methodology used by the FCC and state commissions to set reciprocal compensation rates. TELRIC requires that costs be determined based on the total level of output provided over the network element or service in question.<sup>16/</sup> TELRIC studies are based on “the entire quantity of the network element provided.”<sup>17/</sup> As the FCC explained, under TELRIC:

[t]he forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, . . . divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.<sup>18/</sup>

Thus, TELRIC rates are based on the total level of output. By definition, then, the cost studies underlying current reciprocal compensation rates were based on the average cost of *all* calls, including those to ISPs.<sup>19/</sup>

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<sup>16/</sup> Even the name “TELRIC” refers to Total Element Long-Run Incremental Costs, emphasizing that it is inappropriate under the TELRIC methodology to consider anything less than total output.

<sup>17/</sup> Local Competition Order, 11 FCC Rcd at 15850.

<sup>18/</sup> See id. at Appendix B - Final Rules (emphasis added).

<sup>19/</sup> See, e.g., New York Public Service Commission Cases 94-C-0095, 95-C-0657, and 91-C-1174, Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, et al., Supplemental Testimony of C.R. Curbello, at 25-26 (October 9, 1996) (explaining that the usage components for switching related elements were derived by dividing total investments by “the total busy hour minutes of use served by the switch” to arrive at a per-minute-of-use (“MOU”) investment) (emphasis added); Id. at 30 (explaining that a similar procedure was used to determine tandem switching costs); Id. at 35

In fact, one of the advantages of TELRIC is that it prevents parties from using sample outputs that are not representative of the total and manipulating the data to their own advantage. Removing specific types of calls from the reciprocal compensation mix would therefore undermine the TELRIC methodology and require state commissions to calculate a new rate based solely on the traffic to be included under the new scheme. This time consuming process is totally unnecessary. There is no evidence to support a deviation from the status quo of continuing to apply uniform reciprocal compensation rates to *all* calls, as was originally intended.

Furthermore, as Lightpath explained in its attached comments, the all-encompassing nature of TELRIC is only one of several critical components that went into the creation of the existing reciprocal compensation scheme.<sup>20/</sup> For example, the existing scheme has the additional benefit of being symmetrical in nature. As the FCC explained in its Local Competition Order, “a symmetric compensation rate gives [a CLEC] correct incentives to minimize its own costs of termination . . . .”<sup>21/</sup> In addition, symmetrical rates are administratively easier for regulators to derive and manage than asymmetrical rates based on each carrier’s costs.<sup>22/</sup>

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(explaining that usage was determined by “analyzing all recorded traffic” for a one month period) (emphasis added).

<sup>20/</sup> See Attachment 1 at 7-9; Attachment 2 at 5-7.

<sup>21/</sup> Local Competition Order, 11 FCC Rcd at 16040-41.

<sup>22/</sup> Id. at 16041. Symmetrical rates also encourage competitive entry by allowing potential CLECs to enter the local market without submitting cost studies. Allowing CLECs to rely on ILEC cost studies is consistent with the FCC’s conclusion that “cost information serves no useful purpose” for non-dominant carriers, which lack market power and are therefore “incapable of burdening customers with the costs of underutilizing facilities.” See, e.g., US Sprint Communications Company Limited Partnership, Application for Authority to Operate Facilities in the Private Transatlantic Telecommunications Cable System for the Provision of Authorized Common Carrier Services to the United Kingdom, the Republic of Ireland and Bermuda and Points Beyond, Memorandum, Opinion, Order and Authorization, 4 FCC Rcd 6279, 6283-84

**B. The FCC's Treatment Of CMRS Traffic Serves As Precedent For Treating Jurisdictionally Federal Traffic As Local For Policy Reasons**

The FCC has already allowed other traffic over which it exercises jurisdiction to be subject to state reciprocal compensation rules. At the urging of the ILECs, the FCC ruled that reciprocal compensation should apply to the termination of LEC-CMRS traffic<sup>23/</sup> despite the fact that the FCC treats such traffic as federal for jurisdictional purposes.<sup>24/</sup> The FCC's decision regarding CMRS traffic not only points out the fact that jurisdiction is not dispositive of how traffic should be treated for reciprocal compensation purposes, but also demonstrates the risk of separating out particular types of traffic or users for disparate treatment.

In the CMRS context, the bulk of the minutes are terminated by the ILECs, enabling them to impose considerably more costs on CMRS providers than CMRS providers impose on them.<sup>25/</sup>

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(released August 14, 1989). Requiring CLECs to provide cost studies before they can offer service would create a formidable barrier to entry, given the expense such a cost study would likely entail. See Local Competition Order at 16041-42. Unlike ILECs, CLECs do not yet have a broad customer base over which to defray the onerous expense of a cost study. See id. An asymmetrical compensation scheme based on the costs of the individual carriers involved would also be difficult to administer and would likely lead to anti-competitive results.

<sup>23/</sup> See id. at 15517; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Bell Atlantic Comments, at 6, 8 (March 4, 1996) ("BA CMRS Comments").

<sup>24/</sup> Telecommunications Act at Section 332; see Local Competition Order, 11 FCC Rcd at 15517; CMRS NPRM, 11 FCC Rcd 5020, 5064-5066 (1996). Although some parties may dispute the jurisdictional nature of CMRS traffic, it is clear that the FCC considers such traffic to be subject to federal jurisdiction.

<sup>25/</sup> See Local Competition Order 11 FCC Rcd at 16053; BA CMRS Comments, Attached Statement of Robert W. Crandall on Interconnection Policies of CMRS at 8 ("Current termination rates for cellular traffic generate a substantial amount of revenue for the LECs"); id. at 9 (noting that CMRS traffic is "heavily weighted with calls from the wireless subscribers to LEC subscribers"); Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, SBC Comments, at 11-12 (March 4, 1996) (noting that approximately 80 percent of LEC-CMRS traffic would be terminated by the ILEC).

Recognizing this imbalance in their favor, the ILECs successfully argued that reciprocal compensation should apply to such traffic rather than bill and keep, or some other, alternative compensation method.<sup>26/</sup> CLECs, on the other hand, have succeeded in attracting the bulk of inbound minutes terminating with ISPs. They should receive compensation for terminating this traffic in the same manner as ILECs receive compensation for terminating CMRS traffic.

Allowing reciprocal compensation to apply to jurisdictionally federal CMRS traffic but not to ISP-bound traffic would create a regulatory imbalance favoring ILECs over CLECs – allowing ILECs to reap the rewards of the CMRS traffic they terminate, but not allowing CLECs to enjoy similar benefits from calls to their ISP customers whom CLECs have won in the marketplace. This type of regulatory imbalance would impermissibly discriminate against new entrants in favor of the incumbent monopolists.

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<sup>26/</sup> Ironically, the ILECs’ argument at the time was that applying bill and keep to CMRS traffic would create perverse incentives, encouraging carriers to generate large volumes of *outbound* minutes and “avoid customers that have a disproportionate share of in-bound calls.” BA CMRS Comments at 7-8. According to Bell Atlantic, reciprocal compensation was therefore necessary to encourage LECs to seek customers with inbound minutes. BA CMRS Comments at 7.

## CONCLUSION

For all of the reasons stated above, the FCC should find that the existing, generally applicable, reciprocal compensation scheme and rates continue to apply to ISP-bound traffic. Continuing the current policy of applying reciprocal compensation to ISP-bound traffic would ensure regulatory stability as well as continue the FCC's long-standing policy of treating ISP-bound traffic as local. Conversely, separating out ISP-bound traffic for unique treatment would lead to a piecemeal dismantling of the carefully crafted scheme currently in place and unfairly deprive CLECs of gains they have won in the marketplace.

Respectfully submitted,

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Dated: April 12, 1999

## **ATTACHMENT 1**

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

<b>In the Matter of ACC National Telecom Corp.</b>	)	<b>Case 98-C-1273</b>
<b>Blocking Obligations for Chatline Services</b>	)	
	)	
<b>Complaint of Origin Communications, Inc.</b>	)	<b>Case 98-C-1479</b>
<b>Against Frontier Telephone of Rochester, Inc.</b>	)	
<b>Concerning Alleged Blocking of Free Chatlines</b>	)	

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**COMMENTS OF CABLEVISION LIGHTPATH, INC.**

Cablevision Lightpath, Inc. (“Lightpath”), by its attorneys, hereby files these comments in the above-referenced proceeding in response to the New York Public Service Commission’s (“PSC’s”) Chatline Order.<sup>27/</sup> As part of the PSC’s forward looking pro-competitive policies, it developed a comprehensive framework for local competition, a key component of which is a carefully considered, sound regime for compensating carriers for terminating calls. Now, Bell Atlantic-New York (“BA-NY”) is using the regulatory process in every which way it can to address its situation with respect to calls terminating to Internet service providers (“ISPs”). In so doing, BA-NY never addresses the most obvious question in response: Why doesn’t it simply

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<sup>27/</sup> Cases 98-C-1273 and 98-C-1479, Order Directing Carriers to File Tariffs for Chatline Services and Related Actions (issued and effective February 4, 1999) (“Chatline Order”) (inviting interested local exchange carriers to file cost or rate design information, if any, which tends to support a different compensation scheme for the termination of large call volumes to a single customer).

In addition, Lightpath has received a copy of Bell Atlantic - New York’s (“BA-NY’s”) early-filed comments in this proceeding. Lightpath did not receive these comments in time to fully respond to them here, but its preliminary reading indicates that BA-NY is relying on weak, unsubstantiated arguments in an attempt to upset the carefully crafted regulatory scheme the PSC developed to govern reciprocal compensation. Lightpath will file its formal response to BA-NY’s March 15 filing in accordance with the procedural schedule issued by the PSC. Case 97-C-1275, Notice Requesting Comments on Reciprocal Compensation Proposals (Issued March 18, 1999)

compete for these customers as CLECs have successfully done? Any decision to alter the PSC's reciprocal compensation scheme to carve out exceptions for particular types of calls would represent a stunning departure from the PSC's carefully considered reciprocal compensation regime. At a minimum, the PSC would have to undertake a comprehensive review, including examination of all ILEC and CLEC traffic patterns, appropriate cost studies, hearings, and full economic analyses before taking any action on rates, even on an interim basis.

Moreover, relying on the business environment reflected in New York's established rate-setting policy, companies such as Lightpath have invested millions of dollars in New York to offer competitive, high quality telephone service. Competition cannot thrive in any market, however, if competitive companies cannot rely upon a stable regulatory environment. Upsetting the sound economically-based current framework, which was developed with the input of many parties and the complete support of BA-NY, would create uncertainty, thwart existing business arrangements, and severely undermine competition in New York.

Recognizing the importance of regulatory stability, the PSC has acted to minimize the immense potential for disruption the proposed regulatory changes could cause by explicitly stating that "existing interconnection agreements will be unaffected" by this proceeding.<sup>28/</sup> Lightpath urges the PSC to resist *any* attempts to change existing reciprocal compensation arrangements or recalculate the applicable rates, even on an interim basis, where as here, such changes have in no way been justified. Lightpath would be pleased to participate in a measured, considered process regarding the overall reciprocal compensation scheme, but will vigorously resist any attempt to

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(comments on BA-NY's March 15 filing are due March 29) ("Notice Requesting Comments").

<sup>28/</sup> Chatline Order at 11.

make discrete, special protective rules relating to one type of customer to assist a specific carrier who was unable to adapt to competitive market conditions.

## **INTRODUCTION AND SUMMARY**

Lightpath is a full service, facilities-based competitive local exchange carrier (“CLEC”) and is committed to offering a broad range of services to a wide variety of business and residential customers in New York. Using state-of-the art 5ESS switches, Lightpath is able to offer all forms of switched voice and data services, including basic telephone services. Cablevision Systems Corp. (“Cablevision”) along with its affiliates, including Lightpath, is spending hundreds of millions of dollars to upgrade its network in New York and expand its deployment of two-way interactive digital services. Cablevision and Lightpath are also spending tens of millions additional dollars on switching and other costs to provide telephone services over this upgraded network.

Contrary to the common portrayal of CLECs as targeting only commercial customers, Lightpath serves both commercial and residential customers using primarily its own facilities. In fact, Lightpath has more residential customers than business customers, many of them located in the less densely populated suburban areas where competition tends to lag. Furthermore, Lightpath offers its residential customers services at rates significantly lower than Bell Atlantic<sup>29/</sup> - and Lightpath manages to provide these customers with the highest level of service, as evidenced by the recent commendation it received from the PSC.<sup>30/</sup> Given Lightpath’s competitive rates and excellent service record, it is no surprise that it attracts a wide variety of residential and business customers, including ISPs. These ISPs make up a very small percentage

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<sup>29/</sup> This is particularly noteworthy given that Bell Atlantic often claims that it serves these customers at rates that are below its costs.

<sup>30/</sup> Commission Issues Commendation to Telephone Companies for Excellent Service, Public

of the thousands of customers Lightpath serves.<sup>31</sup> They do, however, often receive large volumes of calls, similar to information providers (“IPs”). To the extent that these ISPs resemble chatline providers, Lightpath’s investment strategy will therefore be impacted by changes in the current compensation scheme, even though it does not offer chatline services.<sup>32/</sup>

There are legitimate network costs associated with the termination of local phone calls. Recognizing this basic fact, the PSC instituted proceedings to determine the best way for local exchange carriers (“LECs”) to compensate each other for the costs associated with terminating each other’s calls.<sup>33/</sup> That proceeding included a collaborative phase involving over 30 industry participants, including Bell Atlantic and staff experts. After exhaustive proceedings, a thorough examination of the evidence, and careful consideration of the policy implications, the PSC established the current reciprocal compensation scheme and rates. Ultimately, the PSC based its rates mostly on studies submitted by BA-NY, which set out the costs involved in carrying and terminating calls.<sup>34/</sup> These cost studies reflected the actual cost for *all* calls traveling over a LEC’s network, including calls to ISPs, residential, business and other users.

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Service Commission Release, at 1 (March 16, 1999).

<sup>31</sup> ISPs make up less than one percent of Lightpath’s total customer base.

<sup>32/</sup> Although the Chatline Order deals primarily with issues uniquely related to chatline services, the wording of the Order leaves open the possibility that the PSC may consider compensation schemes for the termination of large call volumes to any single customer, regardless of whether that customer provides chatline services.

<sup>33/</sup> See Case 94-C-0095, Order Instituting Proceeding (Issued and Effective February 10, 1994).

<sup>34/</sup> The PSC also examined cost models submitted by AT&T and MCI. See Cases 95-C-0657, 94-C-0095 and 91-C-1144, Opinion and Order Setting Rates for First Group of Network Elements, at 12, 15 (issued and effective April 1, 1997) (“97-2 Order”).

The existing reciprocal compensation scheme is therefore the product of a thorough investigation by the PSC, and should not be discarded lightly. Any party seeking to alter the current scheme, even on an interim basis, must present compelling evidence that either the overall approach, which was supported by BA-NY, or the underlying cost structure has significantly changed since the PSC issued its reciprocal compensation order.<sup>35/</sup> No such evidence exists: Nothing has occurred in the intervening months since the PSC issued its reciprocal compensation order to undermine the PSC's confidence in the current scheme or rates. Specifically, there is no evidence to support the exclusion of IP or ISP traffic from existing reciprocal compensation arrangements.

The most important issue for the PSC to consider, however, is the need for regulatory certainty if competition is to survive in New York. Companies formulate business plans and invest millions of dollars based on the regulatory landscape established by the PSC, and the PSC's policies have played a leading role in facilitating competition and entry in New York. When the PSC reverses its position, it changes the underlying market and reduces the value of the investments made based on its earlier pronouncements, thereby threatening continued investment. The PSC reached its decision on reciprocal compensation based on careful consideration of all the evidence and with ample opportunity for input from interested parties. If it changes position in mid-stream and makes ad hoc adjustments because one carrier complains particularly loudly, without developing an equally sound structure to replace it, it will severely hamper continued competition in the local market. Companies such as Lightpath simply cannot be expected to

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<sup>35/</sup> Any such evidence, would of course, have to be subject to full evidentiary process, including an opportunity for Staff and interested parties to examine the evidence presented and submit comments and rebuttal evidence.

invest the millions of dollars necessary to compete with the ILECs if they run the risk of having the regulatory rug pulled out from under them.

Lightpath respectfully urges the PSC to:

- Confirm that any changes to reciprocal compensation rates will not take effect until the expiration of existing interconnection agreements<sup>36/</sup> and even then, only if a party has met the heavy evidentiary burden of showing that the current scheme needs to be revised; and
- Keep the current reciprocal compensation scheme and rates in place.

**I. ANY CHANGES IN RECIPROCAL COMPENSATION ARRANGMENTS ARISING OUT OF THIS PROCEEDING SHOULD NOT AFFECT EXISTING INTERCONNECTION AGREEMENTS OR CURRENT RATES UNDER SUCH AGREEMENTS**

As the PSC recognized in its Chatline Order, any rate changes arising out of this proceeding should not affect existing interconnection agreements.<sup>37/</sup> Most interconnection agreements, including Lightpath's, contain provisions governing change of law and dispute resolution.<sup>38/</sup> Any changes affecting these agreements should be made pursuant to these provisions. Lightpath therefore requests that the PSC re-iterate its position that existing agreements will be unaffected by the outcome of this proceeding. The PSC should also clarify that current rates under such agreements will remain in effect at a minimum until the expiration of such agreements, and beyond, unless there has been a demonstrated need to adjust the overall

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<sup>36/</sup> Lightpath does not oppose all rate adjustments affecting reciprocal compensation. It does, however, categorically oppose adjustments, such as those contemplated here, that involve the disaggregation or disparate treatment of different types of traffic. Lightpath's position is based on sound policy and the PSC's own pronouncements. Chatline Order at 11 ("existing interconnection agreements will be unaffected.")

<sup>37/</sup> Chatline Order at 11 ("existing interconnection agreements will be unaffected.")

<sup>38/</sup> See, Case No. 97-C-0961 - Interconnection Agreement between Cablevision Lightpath and NYNEX at ¶¶ 29.3, 30.11 (filed Aug. 14, 1997) ("Interconnection Agreement").

scheme. To do otherwise would strip CLECs of the regulatory certainty they need to continue investing in their networks and rolling out competitive telephone service.<sup>39/</sup>

## **II. THE PSC ACTED CORRECTLY IN ADOPTING THE CURRENT RECIPROCAL COMPENSATION RATES AND APPLYING THEM TO ALL CALLS**

It has been less than two years since the PSC first adopted the rate structure underlying reciprocal compensation,<sup>40/</sup> and less a than year since it last relied on this established structure in revising reciprocal compensation rates.<sup>41/</sup> In determining inter-carrier compensation, the PSC was guided by several key principles, the most critical of which were that: 1) LECs are entitled to compensation for the costs of the traffic they terminate and the services they provide, and 2) these compensation rates should be uniform, non-discriminatory and encourage efficiency.<sup>42/</sup> Acting on

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<sup>39/</sup> Any evidence or cost and rate design information submitted to demonstrate the need for an adjustment must be subject to a full evidentiary hearing where it can be evaluated, analyzed and critiqued by both Staff and the parties. See Chatline Order at 11 (if cost data is filed, Staff will analyze the data and recommend what procedures, if any, should be pursued, and whether further Commission action is necessary).

<sup>40/</sup> See 97-2 Order at 1 (setting the rates for local and tandem switching, among other network elements). Reciprocal compensation rates are based on local switching costs, which include common trunk and local usage costs, and tandem switching costs, which include local switching plus common trunk (x 2) plus tandem usage plus transport usage. See, e.g. Letter from Sandra Dilorio Thorn, General Counsel, Bell Atlantic, to John C. Crary, Secretary, Public Service Commission (July 20, 1998) (“Rate Revision Letter”).

<sup>41/</sup> See Cases 95-C-0657, 94-C-0095 and 91-C-1174, Order Approving Tariff and Directing Revisions (Issued and Effective June 12, 1998) (directing BA-NY to revise certain tariffs on a temporary basis). BA-NY clearly acknowledged that the PSC’s rate revisions were TELRIC-based, and did not dispute TELRIC’s applicability. See Rate Revision Letter at 1 (stating that the “proposed TELRIC rates” being filed, and currently in effect, were filed in compliance with the PSC’s June 12, 1998 Order). Thus, less than nine months ago BA-NY implicitly agreed that TELRIC remains the correct methodology for determining cost-based rates. Nothing has occurred in the intervening months to change this analysis.

<sup>42/</sup> Level Playing Field Issues - Number Portability, Directory, and Inter-carrier Compensation, A Staff Report in Module 2 Case 94-C-0095 - The Telecommunications Competition II Proceeding, at 36-37 (February 15, 1995) (“Level Playing Field”).

these principles, the PSC established reciprocal compensation rates that were symmetrical<sup>43/</sup> and compensated carriers based on their costs.<sup>44/</sup> The appropriate cost basis was determined by examining the incumbent LEC's (BA-NY's) costs<sup>45/</sup> using Total Element Long-Run Incremental Cost ("TELRIC") methodology.<sup>46/</sup> By relying on TELRIC, BA-NY and the PSC ensured that the cost studies accounted for *all* calls carried by a LEC, regardless of type, duration or customer.<sup>47/</sup>

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<sup>43/</sup> Level Playing Field at 59 (CLECs should be allowed to charge rates equivalent to those charged by the ILEC at their common meet point); Accord Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16040-42 (released August 8, 1996) ("Local Competition Order") (directing states to establish "presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic").

<sup>44/</sup> Though cost-based, these reciprocal compensation rates are meant to allow for a "reasonable profit." See 47 U.S.C. § 252(d)(1)(B); 97-2 Order at 8.

<sup>45/</sup> See 97-2 Order; Case 94-C-0095, Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation, at Appendix A (Issued and Effective September 27, 1995) (requiring the largest ILEC in a given LATA to set rates for local termination, and establishing that CLECs need not file cost support for their rates as long as their rates are no higher than those of the ILEC) ("Intercarrier Compensation Order"); Accord Local Competition Order at 16040 (directing that the ILEC's forward-looking costs for transport and termination of traffic should be used as a proxy for the costs incurred by the interconnecting CLEC). The decision to rely on BA-NY's cost studies was consistent with the long established recognition that "cost information serves no useful purpose" for non-dominant carriers, which lack market power and are therefore "incapable of burdening customers with the costs of underutilizing facilities." See, e.g., US Sprint Communications Company Limited Partnership, Application for Authority to Operate Facilities in the Private Transatlantic Telecommunications Cable System for the Provision of Authorized Common Carrier Services to the United Kingdom, the Republic of Ireland and Bermuda and Points Beyond, Memorandum, Opinion, Order and Authorization, 4 FCC Rcd 6279, 6283-84 (released August 14, 1989); see also Local Competition Order at 16040 (concluding that it is reasonable to use the ILECs cost study as a "presumptive proxy" for other carriers' costs, because, *inter alia*, "larger LECs are generally in a better position to conduct a forward-looking cost study than smaller carriers.") See also section II.C.1. *infra*.

<sup>46/</sup> See 97-2 Order.

<sup>47/</sup> As Lightpath will discuss at length in its March 29<sup>th</sup> comments to the PSC, while the FCC recently concluded that ISP-bound traffic is "jurisdictionally mixed and appears to be largely interstate," it also made clear that parties continue to be bound by their existing interconnection

Due to its forward-looking nature, TELRIC also helped ensure that the rates adopted by the PSC took into account the possibility of technological improvements and likely changes in network usage, and the effect these changes would have on network costs.<sup>48/</sup>

#### **A. TELRIC Costs Are Determined Based On Total Levels Of Output**

The TELRIC methodology mandated by the Federal Communications Commission (“FCC”) and adopted by the PSC<sup>49/</sup> requires that costs be determined based on the total level of

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agreements, as interpreted by state commissions. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, at 2, ¶ 1 (released February 26, 1999) (“Declaratory Ruling”). In addition, the FCC did not pre-empt state commissions’ independent regulatory authority to subject ISP-bound calls to reciprocal compensation. See Id. at 15-18, ¶¶ 24-27 (state commissions are free to impose reciprocal compensation obligations on ISP-bound traffic, despite the FCC’s conclusion that such traffic is largely interstate in nature). Thus, jurisdictionally, the PSC may continue to treat calls to ISPs as local calls for reciprocal compensation purposes. The PSC has already found that calls to an ISP are subject to reciprocal compensation, similar to any other intraLATA calls. See Case 97-C-1275, Order Closing Proceeding, at 2-3 (Issued and Effective March 19, 1998). Even the Chatline Order opening this proceeding makes clear that any adjustments under consideration will be based on New York’s public policies, *not* on jurisdictional distinctions. The PSC’s policies should continue to stand, as Lightpath will demonstrate in its March 29<sup>th</sup> response to BA-NY’s petition to re-open the reciprocal compensation proceeding. See Notice Requesting Comments. Indeed, in light of the fact that the FCC already treats this traffic as local in the closely related access charge context, where it permits ISPs to purchase service from LECs under local tariffs and exempts such traffic from access charges this traffic should continue to be treated as local for purposes of reciprocal compensation. See Declaratory Ruling at 3, ¶ 4, 5, ¶ 7, 7, ¶ 9; see also id. at 14, ¶ 20. In the absence of access charges, reciprocal compensation is the only viable means for LECs to recover their costs associated with terminating calls to ISPs. The only other alternative -- imposing a surcharge on ISPs -- would be inconsistent with the principles of local rate regulation, and would undermine public policy by chilling Internet use.

<sup>48/</sup> 97-2 Order; Cases 95-C-0657, 94-C-0095 and 91-C-1174, Opinion and Order Concerning Petitions for Rehearing of Opinion No. 97-2 (Issued and Effective September 22, 1997) (clarifying that TELRIC assumes that the use of the most efficient technology and TELRIC analysis is based on a “least-cost, most efficient” network.) (“97-2 Opinion”). TELRIC’s forward-looking analysis also contemplates that parties are entitled to a return on capital, and estimates such a return in a manner designed to take account of future developments. Id. at 5.

<sup>49/</sup> 97-2 Order at 15.

output provided over the network element or service in question.<sup>50/</sup> As BA-NY accurately explained, “the increment that forms the basis for a TELRIC study shall be the entire quantity of the network element provided.”<sup>51/</sup> More specifically, the FCC mandated that:

The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, . . . divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.<sup>52/</sup>

Thus, by using TELRIC to determine the appropriate rates for the elements underlying reciprocal compensation rates, the PSC ensured that costs were based on the total level of output. By definition, then, the BA-NY cost studies underlying the reciprocal compensation rates were based on the average cost of *all* calls, including those, such as calls to an IP or ISP, that may deviate from the norm – a fact that BA-NY made clear in its testimony to the PSC, explaining that the usage component of its cost studies were based on *all* traffic served by its switches.<sup>53/</sup> In fact, one of the advantages of TELRIC is that it prevents parties from using sample outputs that are not representative of the total and manipulating the data to their own advantage. Removing specific

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<sup>50/</sup> Even the name “TELRIC” refers to Total Element Long-Run Incremental Costs, emphasizing that it is inappropriate under the TELRIC methodology to consider anything less than total output.

<sup>51/</sup> 97-2 Order at 12 (emphasis added); See also Local Competition Order at 15850.

<sup>52/</sup> See Local Competition Order at Appendix B - Final Rules. (emphasis added).

<sup>53/</sup> See, e.g., Cases 95-C-0657, 94-C-0095 and 91-C-1174, Supplemental Testimony of C.R. Curbello, at 25-26 (October 9, 1996) (explaining that the usage components for switching related elements were derived by dividing total investments by “the total busy hour minutes of use served by the switch” to arrive at a per-minute-of-use (“MOU”) investment) (emphasis added); Id. at 30 (explaining that a similar procedure was used to determine tandem switching costs); Id. at 35 (explaining that usage was determined by “analyzing all recorded traffic” for a one month period) (emphasis added).

types of calls from the reciprocal compensation mix would therefore undermine the TELRIC methodology and require the PSC to calculate a new rate based solely on the traffic to be included under the new scheme. This time consuming process is totally unnecessary. There is no evidence to support a deviation from the status quo of continuing to apply uniform reciprocal compensation rates to *all* calls, as was originally intended.

Applying a separate reciprocal compensation rate for IP, or ISP traffic, would also establish a dangerous precedent and encourage carriers to abuse the regulatory process. ISP-bound traffic is treated the same as all other local traffic, and looks the same in the network. The only reason to exclude calls to ISPs from generally applicable reciprocal compensation arrangements is that some LECs are having difficulty competing for these customers. This presents a slippery slope.

If the PSC removes IP- or ISP- bound traffic from reciprocal compensation now, it will create a precedent for excluding future groups of customers that CLECs win away from BA-NY. Next, the PSC may be asked to consider adopting a separate scheme for other customers that attract large volumes of inbound traffic, such as call centers and radio stations featuring listener call-in shows. After that, CLECs might ask regulators to level the playing field by implementing a different (non cost-based) compensation scheme for classes of customers, such as wireless customers, that currently *benefit* incumbents by generating disproportionately large volumes of *outbound* traffic. Bell Atlantic would undoubtedly oppose any attempt to treat these profitable customers differently, given how hard it fought to have cost-based reciprocal compensation apply to cellular carriers in the first place.<sup>54/</sup> Such disputes over which regulatory schemes should apply

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<sup>54/</sup> See, e.g., Local Competition Order at 16010.

to which customers would lead to endless regulatory gaming, undermine competition, and lead to the inefficient use of regulatory resources, because the PSC would be asked to separately regulate smaller and smaller market niches (*i.e.*, business, residential, ISPs, large originators, large terminators, long calls, short calls, data calls, voice calls.)<sup>55/</sup> These are precisely the types of problems the current scheme was designed to avoid, by applying a single, uniform scheme to *all* traffic, regardless of type or customer.

**B. The Reciprocal Compensation Rates Adopted by the PSC Do Not Need to Be Adjusted to Reflect Changes in Output or Traffic**

As BA-NY, and other parties to the PSC's rate-setting proceedings recognized, the TELRIC studies presented to the PSC were forward-looking and based on long-run incremental costs.<sup>56/</sup> Thus, the TELRIC studies examined and approved by the PSC took into account cost trends and possible changes in future output, or traffic. As the PSC itself explained, under a TELRIC analysis, data "are evaluated and adjusted in accordance with anticipated future developments."<sup>57/</sup> Given the forward-looking nature of TELRIC, it is simply not credible to argue that "new" developments regarding traffic patterns or holding times warrant a restructuring of the reciprocal compensation rates, particularly so soon after the PSC issued its rate decision. Nor can a credible argument be made that current traffic patterns are so deviant from those contemplated in the PSC's 97-2 Order that they require a new type of compensation arrangement. This is particularly true given that IPs and ISPs already existed in the mid-1990's when the current rules were developed, and those services were already thriving at that time.

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<sup>55/</sup> See section II.D., *infra*. As the industry moves towards convergence these distinctions will become even more plentiful and less meaningful.

<sup>56/</sup> 97-2 Order at 12.

<sup>57/</sup> 97-2 Opinion at 6 (emphasis added).

### C. The Current Reciprocal Compensation Scheme is Pro-Competitive

#### 1. The Symmetrical Nature Of Reciprocal Compensation Rewards Efficient Competitors

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The symmetrical mutual compensation scheme adopted by the PSC encourages efficiency in the local market.<sup>58/</sup> As the FCC explained in its Local Competition Order, “a symmetric compensation rate gives [a CLEC] correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs.”<sup>59/</sup> Thus, the symmetrical scheme currently in place was intended to ensure that CLECs were not penalized for their efficiency. This was accomplished by allowing CLECs to capture any difference between their termination costs and those of the ILEC.

An asymmetrical compensation scheme based on the costs of the individual carriers involved would likely lead to anti-competitive results. For example, if BA-NY were allowed to pay compensation based on the costs of the terminating CLEC, while the CLEC had to pay Bell Atlantic based on BA-NY’s costs, the result would be to reward the most inefficient carriers. If a CLEC managed to lower its termination costs through efficiencies in its network, it would have to pass those savings on to BA-NY, in the form of lower reciprocal compensation rates. At the same time, the CLEC would still have to pay BA-NY a higher rate based on the ILEC’s less efficient network. This would have the perverse effect of punishing the CLEC for its relative

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<sup>58/</sup> See Intercarrier Compensation Order at Appendix A (requiring that termination rates for reciprocal compensation must be symmetrical).

<sup>59/</sup> Local Competition Order at 16040-41. There are several other policy reasons militating in favor of symmetrical rates. For instance, symmetrical rates are administratively easier for a commission to derive and manage than asymmetrical rates based on each carrier’s costs. Id. at 1088. In addition, symmetrical rates encourage competitive entry by allowing potential CLECs to enter the local market without submitting cost studies. Requiring CLECs to provide cost studies before they can offer service would create a formidable barrier to entry, given the expense such a cost study would likely entail. See id. at 16041-42.

efficiency while rewarding BA-NY for its inefficiency. The current symmetrical arrangements eliminate this distortion by allowing carriers to benefit from their own efficiencies.<sup>60/</sup>

In creating a symmetrical scheme applying to all traffic, the PSC must have recognized the possibility that reciprocal compensation might result in some customer types being served above actual costs, and others being served below such costs – that is the necessary result of any scheme based on the *average* costs of all traffic. Moreover, the same is true of end user rates, where business customers are more profitable than residential customers. This is the natural result of any scheme based on average costs. It is not the result of poor regulation. In fact, as noted above, such a system benefits competition by creating incentives for carriers to maximize their efficiency.

The PSC should not punish efficient or innovative CLECs who are able to identify and exploit market opportunities. Rather, such carriers should be rewarded for bringing true competition to the market. If some CLECs are able to serve ISPs more cheaply than other LECs can, then ISPs will turn to those CLECs for service. Faced with competition in the ISP market, a LEC can either 1) concede the market to its competitors; 2) offer better, or more efficient service than its competitors; 3) beat its competitors price; or 4) seek regulatory relief. The first three options are market driven and promote competition while the last option retards competition by dragging the PSC into the marketplace.

2. Imbalances In Amounts Of Traffic Terminated By Different Carriers Is A Function Of Competition In The Market

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<sup>60/</sup> Symmetrical rates also have the added benefit of reducing an ILEC's ability to use its bargaining strength in negotiations with CLECs. For example, if rates were not symmetrical, BA-NY would be able to force CLECs to pay it excessively high termination rates, while accepting exceedingly low termination payments from BA-NY, an arrangement that would obviously stifle competition. See Local Competition Order at 16041.

Any imbalances in the overall ratio of traffic terminated between carriers are a natural result of a competitive market not regulatory loopholes, and should therefore be addressed in the marketplace not in a regulatory proceeding. All LECs have the opportunity to compete for and attract customers with specific call patterns. To the extent that an imbalance exists, it is more likely to be an indication of differences in service quality and efficiency than a sign of regulatory mismanagement. If some carriers are more successful at targeting or attracting profitable customers than others, they should be allowed to benefit from their success. That is the nature of a competitive market. An imbalance in reciprocal compensation payments should therefore create an incentive for the carrier that experiences the negative balance to intensify and improve its marketing efforts with respect to certain types of customers. Imbalances in reciprocal compensation payments therefore reinforce the workings of the competitive marketplace and should be welcomed by the Commission as a sign that competition is beginning to work to the advantage of ratepayers in the State of New York.

**D. Allowing Exceptions for Particular Kinds Of Traffic, or a Particular Class of Customers Will Undermine Competition and Lead to the Inefficient Use of Regulatory Resources**

Ironically, ILECs, such as BA-NY, originally favored reciprocal compensation over a “bill and keep” regime as the best means of recovering their costs for terminating local calls.<sup>61/</sup> Now

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<sup>61/</sup> Similarly, the ILECs, including Bell Atlantic, originally characterized ISP-bound traffic that originated and terminated within the same exchange service area as local and still charge their own customers local rates for calls to ISPs. For example, in obtaining FCC approval to provide “Internet Access Services,” Bell Atlantic asserted that calls to ISPs over the public switched network are fundamentally local in nature. See In the Matter of Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCB Pol. 96-09, Bell Atlantic Reply Comments at 4-5 (filed Apr. 29, 1996); see also Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX, CCB Pol. 96-09 at 4 (filed May 5, 1997) (“Bell Atlantic CEI Plan”) (“[I]n providing this [Internet Access Service] Bell Atlantic and its vendor will subscribe only to generally-available local

that reciprocal compensation has boosted competition and cut into their monopolies, ILECs such as BA-NY are seeking to revise the reciprocal compensation arrangements they originally endorsed. The PSC should not allow this sort of manipulation of the regulatory process. A carrier that advocates a particular rule when they think such a rule will work to their advantage, should not be allowed to run to the PSC and argue in favor of a new position when experience shows that the rule favors more nimble competitors – especially where that carrier is *not* advocating giving up the advantages it enjoys with respect to other customer types, such as wireless carriers. This type of regulatory indulgence would undoubtedly encourage ongoing requests of carriers whenever the market turned against them. This would lead to an inefficient use of regulatory resources as carriers continue to rely on the PSC, rather than the market, to address competitive imbalances.<sup>62</sup>

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telecommunications services.”).

<sup>62</sup> Carriers should, of course, remain free to negotiate mutually beneficial arrangements, if they choose to do so.

## CONCLUSION

For all of the reasons stated above, the PSC should find that the existing reciprocal compensation scheme and rates continue to apply to all traffic with local traffic characteristics, including traffic terminating with large volume users such as ISPs and IPs. The PSC should also confirm that any changes to reciprocal compensation rates will not take effect until the expiration of existing interconnection agreements and that even then any party seeking to revise the current scheme carries a heavy burden of proof. Any contrary decision is likely to severely undermine competition in the local market and entangle the PSC in an unending series of regulatory proceedings.

Respectfully submitted,

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Dated: March 22, 1999

## **ATTACHMENT 2**

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

<b>In the Matter of ACC National Telecom Corp.</b>	)	<b>Case 98-C-1273</b>
<b>Blocking Obligations for Chatline Services</b>	)	
	)	
<b>Complaint of Origin Communications, Inc.</b>	)	<b>Case 98-C-1479</b>
<b>Against Frontier Telephone of Rochester, Inc.</b>	)	
<b>Concerning Alleged Blocking of Free Chatlines</b>	)	

**REPLY COMMENTS OF CABLEVISION LIGHTPATH INC.**

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March 29, 1999

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**STATE OF NEW YORK  
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**REPLY COMMENTS OF CABLEVISION LIGHTPATH, INC.**

Cablevision Lightpath, Inc. (“Lightpath”), by its attorneys, hereby files these reply comments in the above-referenced proceeding pursuant to the procedural schedule issued by the New York Public Service Commission (“PSC”).<sup>63/</sup> Neither Bell Atlantic-New York (“BA-NY”) nor Frontier Telephone of Rochester, Inc. (“Frontier”) has demonstrated any reason for the PSC to tamper with the carefully considered reciprocal compensation scheme currently in place. Instead, both incumbent local exchange carriers (“ILECs”) simply throw around unsubstantiated arguments to support their untenable position that calls terminating with Internet service providers (“ISPs”) should be treated differently from other calls. Adopting BA-NY’s<sup>64/</sup> proposal on an ad hoc basis without a full review of the overall reciprocal compensation scheme, would likely deter competitors’ investments in facilities-based residential and business telephone services, and could

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<sup>63/</sup> Cases 97-C-1275, 98-C-1273 and 98-C-1479, Notice Requesting Comments on Reciprocal Compensation Proposals (Issued March 18, 1999) (“Notice Requesting Comments”).

<sup>64/</sup> Frontier’s comments closely tracked those of BA-NY. While Lightpath opposes the arguments of both ILECs equally, it will refer to them collectively as “BA-NY” for ease of reference.

chill Internet usage. Both results are contrary to the PSC's forward-looking policies favoring competition and promotion of the Internet.<sup>65/</sup>

As BA-NY seems to admit, its main (if not sole) concern is that competitive carriers have succeeded in identifying and capturing a segment of the market that BA-NY believed it could win for itself. Unfortunately, BA-NY has chosen to seek regulatory relief from the PSC rather than addressing the issue in the marketplace. BA-NY's argument is particularly ironic, given its early advocacy of reciprocal compensation over bill and keep, and its position that reciprocal compensation should apply to non-ISP-bound traffic, such as cellular traffic, where the current scheme works to BA-NY's benefit.

BA-NY should not be allowed to win in the regulatory forum what it could not win in the marketplace. Granting BA-NY's requests would undermine competitive investment in New York, needlessly upend the current regulatory scheme, and embroil the PSC in endless disputes over which compensation arrangements should apply to which types of traffic, or customers.<sup>66/</sup>

Most importantly, as both the PSC and BA-NY have recognized, there are legitimate and significant network costs associated with the termination of local phone calls, including calls to ISPs. Sound economic policy, as well as regulatory fairness, requires that LECs be fully

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<sup>65/</sup> Singling out a particular type of traffic on an ad hoc basis is simply unacceptable, and is contrary to the principles of TELRIC. As Lightpath explained in its initial comments, any change to the current reciprocal compensation scheme must apply comprehensively to all traffic, and should be the product of full proceedings before the PSC. These proceedings should also include a collaborative process. Lightpath would certainly be willing to participate in any such proceedings, and collaborative process.

<sup>66/</sup> In addition, as the PSC is aware, BA-NY is nearing approval for entry in New York into the multi-billion dollar long-distance market, after which it will have even greater incentive to abuse its bargaining power in negotiations with CLECs. Against this backdrop, it is especially vital that the PSC not undermine current arrangements that ensure that CLECs are fully compensated for the costs they incur for terminating all local traffic, including calls to ISPs.

compensated for these costs. Lightpath, for example, terminates many minutes of calls to many different customers. If Lightpath is not fairly compensated for its termination costs for these calls, it will not be able to continue making the huge investments necessary to upgrade its network and roll-out local service.<sup>67/</sup> This in turn would deprive ISPs and other end-users of competitive options, chill Internet usage, and otherwise reduce competition in the local market.

Recognizing that carriers must be able to fully recover their termination costs if they are to interconnect, the PSC established the current reciprocal compensation scheme to ensure that LECs compensate each other for these costs. In determining the appropriate framework and rates, the PSC conducted exhaustive proceedings, thoroughly examined volumes of evidence,<sup>68/</sup> and carefully considered the policy implications of various alternatives before establishing the current reciprocal compensation scheme and rates. The existing reciprocal compensation scheme is therefore not some hastily created, arbitrary rule, but the product of a thorough regulatory process.

The PSC should not allow BA-NY to subvert its well-conceived, sound, regulatory scheme simply because competitors have succeeded in winning customers from the ILECs in the marketplace. Instead the PSC should maintain the status quo by reaffirming that:

- The policy rationales underlying TELRIC and symmetry require that reciprocal compensation arrangements continue to be applied to all local traffic in the aggregate, not in a piecemeal fashion that discriminates between particular classes of customers; and

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<sup>67/</sup> Lightpath currently continues to make these investments, having recently installed a second switch on Long Island.

<sup>68/</sup> This evidence consisted largely of BA-NY cost studies and testimony setting out the costs involved in carrying and terminating all calls, including calls to ISPs, that travel over a LEC's network.

- That there is no need to replace the current rate structure, or subject CLECs to onerous cost proceedings.

# **I. BA-NY’S BLANKET CHARACTERIZATION OF CLECS AS MERE FRONTS FOR ISPS IS AN EXAGGERATION AND IGNORES THE DIVERSITY IN THE CLEC COMMUNITY**

The PSC should not fall prey to BA-NY’s attempts to tar all CLECs with the same broad brush. BA-NY relies on a couple of Internet postings related to a handful of CLECs to support its categorical characterization of all CLECs as niche players that exist solely to exploit regulatory anomalies. Nothing could be further from the truth.<sup>69/</sup> Contrary to BA-NY’s caricature of CLECs as sham carriers that exist only as “fronts” for ISPs, Lightpath is a full service, facilities-based competitive local exchange carrier (“CLEC”) committed to offering a broad range of services to a wide variety of business and residential customers in New York.<sup>70/</sup> In fact, ISPs

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<sup>69/</sup> BA-NY’s misleading attempts to categorize all CLECs based on anecdotal evidence regarding a small minority of competitors underlies its entire pleading. For instance, BA-NY extrapolates from certain provisions in a few interconnection agreements to argue that it no longer has contractual reciprocal compensation obligations to any CLECs. BA-NY should not be allowed to discharge its evidentiary burden, or circumvent its contractual obligations, in such a generic, off-hand manner. Each interconnection agreement is unique, with its own language reflecting the intent of the specific parties involved. Accordingly, if BA-NY believes it has claims under its specific interconnection agreement with Lightpath in light of the FCC’s ruling, it should address those issues directly to Lightpath, pursuant to section 29.3 of the agreement. See Case No. 97-C-0961 - Interconnection Agreement between Cablevision Lightpath and NYNEX at § 29.3 (filed Aug. 14, 1997) (“Interconnection Agreement”) (obligating the parties to enter into good faith negotiations if any legislative, regulatory, judicial or other legal action materially affects any material terms of the agreement). It should not make an end-run around its contract with Lightpath by filing a pleading with the PSC. Nor should it treat all CLECs as if they have identical customer-bases, networks or interconnection agreements. Such assumptions are patently false and ignore the reality in the marketplace.

<sup>70/</sup> In other words, Lightpath provides precisely the “full range of local exchange services to end-user customers” that even BA-NY agrees entitles it to reciprocal compensation. See Cases 98-C-1273 and 98-C-1479, ACC National Telecom Corp. Blocking Obligations for Chatline Services, Bell Atlantic-New York’s Comments on Costs and Rate Structures Applicable to Large-Volume Call Termination to Single Customers, at 4 (March 15, 1999) (“BA Comments”). In addition, Lightpath has not entered into any “rebate” or any other revenue sharing agreements of the type that BA-NY devotes pages to excoriating.

constitute only a tiny portion of the thousands of customers Lightpath serves. It should be clear then that Lightpath does not exist solely to serve ISPs, or as a “front” to such customers. Rather, Lightpath serves ISPs as part of its commitment to offer full local service to all types of customers. Nonetheless, Lightpath has the right to be properly compensated for its legitimate network costs associated with terminating calls to these ISP customers.

## **II. THE PSC’S COMPREHENSIVE RECIPROCAL COMPENSATION SCHEME WOULD BE UNDERMINED IF BA-NY IS ALLOWED TO SELECTIVELY EXCLUDE PARTICULAR TYPES OF CALLS**

BA-NY’s argument that reciprocal compensation should not apply to ISP-bound traffic flies in the face of the thoughtfully crafted, comprehensive regulatory scheme adopted by the PSC. As Lightpath explained in its initial comments, the PSC derived the appropriate rates for reciprocal compensation by examining cost studies (primarily those of BA-NY) which reflected the average cost for *all* calls traveling over a LEC’s network -- including calls to ISPs, and other users. Separating out traffic to one particular class of customers (in this case, those that terminate large volumes of minutes) would therefore undermine the current scheme and require the PSC to recalculate a new average cost per call, based on the remaining call types. Thus, singling out ISP-bound traffic for disparate treatment would defeat the purpose of the TELRIC methodology adopted by the PSC. It would also embroil the PSC in endless regulatory haggling as carriers try to manipulate the system. LECs would continually argue over which customers or what traffic should be subject to reciprocal compensation depending on what was advantageous to them at the time. Each time a LEC succeeded in removing a class of customers or traffic from existing reciprocal compensation arrangements, the PSC would have to institute proceedings and recalculate the applicable rates based on the calls still subject to reciprocal compensation.

Moreover, there can be no doubt that BA-NY seeks to have reciprocal compensation selectively enforced only where it is advantageous to it. For example, BA-NY vigorously argued that reciprocal compensation should apply to the termination of LEC-CMRS<sup>71/</sup> traffic (i.e., traffic between LECs and PCS, cellular and other wireless customers)<sup>72/</sup> -- the bulk of which would be terminated by the ILECs, enabling them to impose considerably more costs on CMRS providers than CMRS providers would be able to impose on them.<sup>73/</sup> Ironically, Bell Atlantic's argument at the time was that applying bill and keep to CMRS traffic would leave ILECs with significant uncompensated costs<sup>74/</sup> and create perverse incentives, encouraging carriers to generate large volumes of *outbound* minutes and "avoid customers that have a disproportionate share of inbound calls."<sup>75/</sup> According to Bell Atlantic, reciprocal compensation was therefore necessary to

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<sup>71/</sup> Commercial Mobile Radio Service ("CMRS") includes most traditional wireless traffic, including personal communications services ("PCS"), cellular and satellite telephone service, among others. See Interconnection Between Local Exchange and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5022 (released January 11, 1996) ("CMRS NPRM").

<sup>72/</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16053 (released August 8, 1996) ("Local Competition Order"); Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Bell Atlantic Comments, at 6, 8 (March 4, 1996) ("BA CMRS Comments").

<sup>73/</sup> See Local Competition Order at 16053; BA CMRS Comments, Attached Statement of Robert W. Crandall on Interconnection Policies of CMRS at 8 ("Current termination rates for cellular traffic generate a substantial amount of revenue for the LECs"); id. at 9 (noting that CMRS traffic is "heavily weighted with calls from the wireless subscribers to LEC subscribers"); Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, SBC Comments, at 11-12 (March 4, 1996) (noting that approximately 80 percent of LEC-CMRS traffic would be terminated by the ILEC).

<sup>74/</sup> BA CMRS Comments at 8.

<sup>75/</sup> BA CMRS Comments at 7.

encourage LECs to seek customers with inbound minutes.<sup>76/</sup> Now its argument has come back to haunt BA-NY, as CLECs have succeeded in attracting the inbound minutes that Bell Atlantic and the other ILECs assumed would accrue to the incumbents. In response, BA-NY has now reversed its position claiming that it is reciprocal compensation that creates perverse incentives (though only with respect to ISP traffic -- not the wireless traffic where the imbalances work to BA-NY's benefit) Clearly, BA-NY is trying to "game" the system -- arguing for reciprocal compensation when it is to BA-NY's advantage, and arguing against it where it works to its disadvantage. This abuse of the regulatory process wastes the PSC's resources and is contrary to the TELRIC-based approach the PSC adopted in creating the current reciprocal compensation rules.<sup>77/</sup>

### **III. BA-NY'S SPECIFIC POLICY PROPOSALS ARE CONTRARY TO ESTABLISHED PRINCIPLES OF RATEMAKING AND WOULD LEAD TO ANTI-COMPETITIVE RESULTS**

BA-NY essentially makes three alternative proposals for modifying reciprocal compensation arrangements for ISP-bound traffic: 1) eliminate all compensation for this traffic; 2) apply a uniform end office rate to all ISP-bound traffic terminated by a CLEC, at least on an interim basis; or 3) implement a new, long term reciprocal compensation rate based on CLEC cost studies. Each of these proposals is at odds with sound public policy.

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<sup>76/</sup> Id.

<sup>77/</sup> As Lightpath has explained, any adjustments to the current scheme would require extensive new TELRIC proceedings establishing a new rate applicable to all calls.

**A. LECs Must Be Compensated For Their Legitimate Network Costs Associated With Transporting And Terminating ISP-Bound Traffic**

BA-NY's first argument, which it properly spends very little time defending, is that LECs should not compensate each other at all for terminating each other's ISP-bound traffic.<sup>78/</sup> What BA-NY fails to acknowledge, however, is that a public policy of "no compensation" would have a significant adverse impact on competition in the local exchange market and have a chilling effect on Internet usage. There are costs associated with terminating ISP-bound calls, and carriers must be compensated for these costs.<sup>79/</sup>

BA-NY's only response is that LECs should recover their transport and termination costs by charging their ISP customers higher rates.<sup>80/</sup> If CLECs were to pass their transport and termination costs on to the ISPs, however, the ISPs would undoubtedly pass most, if not all, of these costs onto *their* customers – residential consumers,<sup>81/</sup> thereby chilling Internet usage, in

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<sup>78/</sup> Bell Atlantic does not, and indeed cannot, argue that the FCC's recent ruling leaves the PSC without authority to order reciprocal compensation. As Lightpath explains more fully in its comments filed today in Case 97-C-1275, the PSC retains the authority to continue applying reciprocal compensation to ISP-bound traffic. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, at 15-18, ¶¶ 24-27 (released February 26, 1999) ("Declaratory Ruling"). Moreover, several interconnection agreements, including the agreement between Lightpath and BA-NY, contemplate the continued application of reciprocal compensation to such traffic independent of the FCC's jurisdictional ruling. See Interconnection Agreement at §5.7; Alabama Public Service Commission Docket 26619, Emergency Petitions of ICG Telecom Group Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling, at 37-38 (effective March 4, 1999).

<sup>79/</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, NYNEX Comments, at 89 (March 16, 1996) (discussing its need to recover costs associated with the termination of traffic).

<sup>80/</sup> BA Comments at 3. This would not only reduce Internet demand, but it would violate the general principle that local end users do not pay surcharges for receiving calls.

<sup>81/</sup> As Frontier correctly points out, the vast majority of dial-up calls to ISPs are generated by residential users, not business. Cases 98-C-1273 and 98-C-1479, ACC National Telecom Corp.

contravention of the established public policy in favor of promoting Internet use.<sup>82/</sup> The only other viable alternative<sup>83/</sup> would be for CLECs to stop serving ISP customers, thereby, depriving an important segment of the market of the benefits of competition.

**B. BA-NY Is Not Entitled To Pay End Office Rates For ISP-Bound Traffic**

In establishing the current reciprocal compensation scheme and rates, the PSC was guided by several principles, including 1) that compensation for interchanged traffic “should be symmetrically applicable among local exchange carriers,” and 2) that such compensation should be based on ILEC costs.<sup>84/</sup> As the PSC recognized, however, “the architecture of new entrant networks [was] not likely to duplicate that of incumbents,” in that CLECs were unlikely to re-create the tandem and end office architecture employed by the ILECs.<sup>85/</sup> A dispute therefore

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Blocking Obligations for Chatline Services, Comments of Frontier Telephone of Rochester, Inc., at 3 (March 19, 1999).

<sup>82/</sup> The logic of this argument belies BA-NY’s claim that it does not seek to “affect the way in which consumers pay for Internet access . . . .” Case 97-C-1275, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Petition to Re-Open C 97-C-1275 Filed by Bell Atlantic-New York, at 2, n.2 (March 2, 1999).

<sup>83/</sup> Continuing to terminate this traffic without being compensated while still paying BA-NY to terminate all other traffic is simply not an option for CLECs such as Lightpath. As new entrants in the local exchange marketplace, CLECs lack the resources and broad customer base that would allow the ILECs to absorb such transport and termination costs. CLECs, therefore, could not afford to terminate traffic to ISPs without receiving reciprocal compensation.

<sup>84/</sup> Case 94-C-0095, Order Instituting Framework for Directory Listings, Carrier Interconnection and Inter-carrier Compensation, at 4 (Issued and Effective September 27, 1995) (“Inter-carrier Compensation Order”); Cases 98-C-1273 and 98-C-1479, ACC National Telecom Corp. Blocking Obligations for Chatline Services, Comments of Cablevision Lightpath Inc., at 15-16 (March 15, 1999) (“Lightpath Initial Comments”) (citing the policy reasons underlying the symmetry rule).

<sup>85/</sup> InterCarrier Compensation Order at 5.

arose over whether symmetry demanded that CLECs be compensated at ILEC end office or ILEC tandem office rates for the traffic they terminate. The PSC addressed the parties' concerns over these issues by deciding that CLECs would be allowed to charge the ILECs' tandem rates where the access it provided is "*functionally equivalent* to a tandem," even though the CLEC's network "may not have a tandem switch."<sup>86/</sup>

Clearly, then, the PSC's decision to allow CLECs to charge tandem office rates was not based on a misguided belief that CLECs would adopt the end office and tandem architecture employed by the ILECs. Rather the PSC acted based on a sound policy judgment that the interests of symmetry and fairness required that CLECs be compensated for the access provided, regardless of the architecture used to provide that access. As the PSC explained, "[f]unctional equivalence is not . . . measured by the size of a carrier's operation, or the architecture employed; rather, it is the ability to terminate [traffic] to all customers served by a carrier's unique, stand alone network by delivery to a single point of interconnection."<sup>87/</sup> In other words, the "test" for determining whether tandem office rates apply is not whether a CLEC has tandem and end offices, but whether an ILEC can reach all of a CLECs' customers through a single interconnection point.<sup>88/</sup> It is irrelevant how the CLEC carries the traffic from its switch to its customers, or how far its customers are from its switch.<sup>89/</sup> The only relevant question is whether the ILEC can bring

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<sup>86/</sup> Id. at 5-6 (emphasis added).

<sup>87/</sup> Id. at 6, n.1 (a footnote conveniently omitted by BA-NY in its comments); Accord Local Competition Order at 16042 ("Where an interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.")

<sup>88/</sup> In this regard, it is important to note that Lightpath's switches each cover broad geographic areas, comparable to those covered by an ILEC tandem.

<sup>89/</sup> The PSC's Chatline Order requested comments focusing on the special characteristics

all its traffic to a single point of interconnection and rely on the CLEC to carry that traffic to the relevant customers.

None of BA-NY's arguments address this key point. BA-NY never claims that it must rely on multiple points of interconnection to reach CLECs' customers. Instead, it merely posits – based on only anecdotal evidence -- that CLECs do not have to carry the traffic very far to reach their customers. Even assuming this were true,<sup>90/</sup> this argument has no bearing on whether the CLEC switches are functionally equivalent to ILECs' tandem switches. Nonetheless, BA-NY devotes pages to an argument it *knows* has no relevance (it even cites to the PSC's InterCarrier Compensation Order, carefully omitting the explanatory footnote excerpted previously).<sup>91/</sup> The

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associated with “the termination of large volumes of calls, with possibly long holding times, to a single customer.” Cases 98-C-1273 and 98-C-1479, Order Directing Carriers to File Tariffs for Chatline Services and Related Actions, at 11 (issued and effective February 4, 1999) (“Chatline Order”). The current reciprocal compensation rates do not include a loop component, and are not distance sensitive. Thus, BA-NY's distance-based arguments are irrelevant. Moreover, it should be recognized that arguments concerning network architecture and customer distance are significantly over inclusive and would lead to a distance-based compensation scheme at odds with the PSC's current methodology.

<sup>90/</sup> For the record, Lightpath's customers, ISPs and non-ISPs alike, are located at widely varying distances from Lightpath's switches, as are BA-NY's own customers.

<sup>91/</sup> BA-NY's proposal to impose a two-to-one ratio test to determine the applicable rates is also seriously flawed because 1) the ratio between incoming and outgoing traffic has nothing to do with whether or not an interconnection point is the functional equivalent of a tandem or end office (or even whether customers are near to or far from CLEC switches); 2) BA-NY's “ratio test” is carefully crafted to ensure that BA-NY continues to be fully compensated for all traffic it terminates to its ISP customers (including collocated or affiliated ISPs) while leaving open the possibility that CLECs may not be adequately compensated for traffic terminated to customers that receive more traffic than they generate (such as radio call-in shows, banks, or large call centers); and 3) BA-NY has set the ratio far too conservatively. As BA-NY admits, the imbalances it experiences with most CLECs “far exceed” the 2:1 ratio BA-NY proposes. BA Comments at 17. In fact, the three “key” ratios listed by BA-NY average over 22:1, “more than an order of magnitude higher,” than the 2:1 ratio proposed by BA-NY. Id. at n.32 (citing ratios of 11:1, 22:1 and 35:1 for “three key CLECs.”)

question is not how far CLECs are located from their customers, but how accessible those customers are to the interconnecting ILEC.

**C. BA-NY's Proposal To Foist Cost Studies On CLECs Is Contrary To The PSC's Basic Rate-Setting Framework And To Its Commitment To Market-Opening, Deregulatory Policies**

BA-NY's proposal to require CLECs to submit cost studies is anti-competitive and antithetical to the rule of symmetry adopted by the PSC.<sup>92/</sup> The symmetrical scheme currently in place is supported by several key public policy considerations. As Lightpath explained at length in its initial comments, a symmetrical scheme creates the correct incentives for carriers by ensuring that CLECs are not penalized for realizing efficiencies in their networks.<sup>93/</sup> Symmetrical rates also encourage competitive entry by allowing potential CLECs to enter the local market without submitting cost studies. Requiring CLECs to provide cost studies before they can offer service would create a formidable barrier to entry, given the expense such a cost study would likely entail.<sup>94/</sup> Unlike ILECs, CLECs do not yet have a broad customer base over which to defray the onerous expense of a cost study. Symmetrical rates are also administratively easier for a commission to derive and manage than asymmetrical rates based on each carrier's costs.<sup>95/</sup> Most importantly, symmetry also reduces an ILEC's ability to use its disproportionate bargaining power in negotiating with CLECs. By requiring ILECs to pay the same reciprocal compensation rates as CLECs, symmetry prevents incumbents from forcing competitors to accept termination payments

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<sup>92/</sup> See Intercarrier Compensation Order at Appendix A (requiring that termination rates for reciprocal compensation must be symmetrical).

<sup>93/</sup> Lightpath Initial Comments at 15-16.

<sup>94/</sup> See Local Competition Order at 16041-42.

<sup>95/</sup> Id.

that are lower than what they pay the ILECs.<sup>96/</sup> BA-NY is trying to circumvent this safeguard by arguing that reciprocal compensation should only apply when it is to the ILEC's advantage (i.e., as with CMRS traffic), but not where it may work to the CLEC's advantage (i.e., ISP-bound traffic). Therefore, the rule of symmetry, and the policies underlying it, dictate that CLECs should continue to be allowed to rely on ILEC cost studies and not be burdened by having to produce their own independent cost studies.<sup>97/</sup>

Finally, BA-NY's call for CLEC cost studies is completely out of synch with the current regulatory atmosphere. It is almost inconceivable to think that the PSC is being asked to consider conducting rate cases and requiring CLECs to produce cost studies in 1999 in the midst of a new era of deregulation and increased competition. The PSC should therefore reject BA-NY's arguments as retrograde attempts to bring back the days of monopoly, when the ILECs controlled the market and did not have to meet the legitimate pressures of true competition. The negative consequences of such actions cannot be overstated. The inability of CLECs such as Lightpath to recover their legitimate network costs will seriously impede, if not jeopardize, the roll-out of facilities-based competition to lower margin residential customers.

## **CONCLUSION**

For all of the reasons stated above, the PSC should reject BA-NY's and Frontier's attempts to undermine the existing holistic reciprocal compensation system and find that the

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<sup>96/</sup> Local Competition Order at 16041.

<sup>97/</sup> The only exception to the general rule that CLECs do not have to provide cost studies to support their rates, is that competitors may present such studies to justify rates higher than those charged by the ILEC. See Intercarrier Compensation Order at Appendix A; Local Competition Order at 16042. Clearly, that is not the issue here.

existing reciprocal compensation scheme and rates continue to apply to all traffic with local traffic characteristics, including traffic terminating with large volume users such as ISPs and IPs.

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Dated: March 29, 1999

## CERTIFICATE OF SERVICE

I, Paula L. Allen, hereby certify that on this 12<sup>th</sup> day of April, 1999, I caused a copy of the foregoing, "Comments of Cablevision Lightpath, Inc." to be sent U.S. mail, postage prepaid to the following:

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